Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL C. MILLER, *Petitioner,*

v.

DONALD L. DEMUTH, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Dated: December 7, 1995

QUESTION PRESENTED FOR REVIEW

Whether constitutional principles of equal protection permit the use of state action to subject Petitioner to a substantial financial penalty because he is gay, thereby directly giving effect to respondent's personal discriminatory animus.

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DANIEL C. MILLER, *Petitioner,*

v.

DONALD L. DEMUTH, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The Petitioner Daniel C. Miller respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania is reported at 665 A.2d 469, and it is reprinted in the Appendix ("App.") hereto, p. 1a.

The opinion of the Superior Court of Pennsylvania is reported at 652 A.2d 891, and is reprinted in the Appendix hereto, p. 2a.

The opinion of the Court of Commons Pleas of Cumberland County, Pennsylvania has not been reported. It is reprinted in the Appendix hereto, p. 48a.

JURISDICTION

The opinion and order of the Superior Court of Pennsylvania was entered on January 11, 1995. The Supreme Court of Pennsylvania denied a petition for allowance of appeal in an order dated September 8, 1995, and entered on September 11, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1. Privileges and Immunities

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case raises an important question of federal law which has not been, but should be settled by this Court: whether the Constitution permits adverse government action against a gay man premised only on an illegitimate desire to punish him based on his "homosexuality."

On October 17, 1990, respondent, Donald L. DeMuth, a Professional Management Consultant, fired his employee, Petitioner, Daniel Miller, because DeMuth had learned that Miller is gay. DeMuth admitted that the firing was based only on Miller's gay sexual orientation, and that it was unrelated to Miller's performance as a management consultant and accountant. Because of the lack of any civil rights law prohibiting sexual orientation discrimination, Miller did not contest the dismissal. Matters would have ended there had not DeMuth sought the assistance of the Commonwealth of Pennsylvania to extract a one-hundred-ten-thousand-dollar ($110,000) penalty from Miller because Miller is gay.

DeMuth's firing of Miller was a private act of prejudice, which he was able to accomplish with no state involvement. The Court is not asked to hold in this case that private employers ungoverned by relevant civil rights laws are barred from firing employees based on their sexual orientation, or any other reason. However the same cannot be said for DeMuth's next step. By suing for judgment under the penalty provision, he sought affirmatively to employ government powers -- as a sword -- in the service of his private efforts to carry out invidious discrimination. When he did so, he subjected those actions to constitutional requirements of equal protection.

The judgment of Pennsylvania's Commonwealth Court, Cumberland County that DeMuth sought, and subsequently won, enforces the following provision, contained in his Employment Agreement with Miller:

> "8. *Contingent Note Payable*. If within five years of the termination of this Agreement *if* the Employee terminates the Agreement or *the Employer terminates the Agreement for cause*, and the Employee establishes a professional management consulting or accounting firm within a 50-mile radius of any of Employer's current or former clients, he agrees to pay the Employer 125% of the previous 12 months' charges for each of the Employer's clients who retain his professional management consulting or accounting services. *Cause shall include*, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer's family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and *homosexuality*." (Emphasis supplied)

It was stipulated that the penalty under the formula in the above paragraph would amount to $110,000.

Miller, who is a Certified Public Accountant (CPA), had worked as a professional management consultant in Demuth's firm, which serves health care professionals, from December of 1985 until he was fired by DeMuth in October of 1990. DeMuth learned of his employee's sexual orientation when Miller appeared on a local news program

decrying a spate of gay-bashing that was underway in his hometown of Harrisburg.

The undisputed testimony established th : in June of 1986, after Miller had been engaged as an hourly employee by DeMuth for six months, the parties entered the first one year contract containing the above penalty provision. It was undisputed that the last executed contract had expired when Miller was dismissed; however, it was not resolved whether Miller had last signed a contract in May of 1988 or May of 1989.[1]

In poignant testimony, Miller reflected on his reasons for *ever* signing a contract containing the penalty provision, as well as his determination, during the negotiations which were underway when he was fired, never to do so again:

> The other reason I wasn't going to sign that [penalty provision] was because in my own development as a gay man, when I began working with DeMuth, I really hadn't come out. And I had made no contact with anyone in the gay or lesbian community...and my knowledge of the gay community and what that

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[1] Despite testimony from both sides that a different contract was in the process of being negotiated in late 1990, when DeMuth fired Miller, the trial court permitted the jury to infer renewal of the last executed contract (signed in May of 1988 and expiring in June of 1989 according to Miller, or one year later, according to DeMuth). The propriety of such an inference, in light of the particular terms of the penalty provision and what Miller alleged was a judicial admission that the contract had expired, was appealed to the Superior Court. That court held against Miller on these two grounds, and that holding is not at issue in this appeal.

> means to be gay was very limited. I didn't know much about it. Over the course of time I met other people that really affirmed myself as a gay man. And I felt that now this contract was really insulting....And I didn't want to subject myself to that.

DeMuth freely admitted at trial that Miller performed well and that Miller was on a partnership track until DeMuth learned of his employee's sexual orientation. Indeed, Miller's salary history reflects his contribution to the firm's business. His annual salary increased steadily and Miller received annual bonuses. In his last year, a significant pension contribution was added to his compensation package.

After DeMuth fired him for being gay, Miller opened his own accounting practice in a neighboring county. DeMuth wrote to a group of his clients who had been receiving services from Miller, suggesting that they be cautious about working with his former employee because, in DeMuth's view, receiving accounting services from a gay man heightened their risk of contracting AIDS. DeMuth also sought to block Miller from becoming a certified professional business consultant by contacting an organization that certifies such consultants and urging that it deny Miller's qualification because he is gay. Then, one year after the firing, DeMuth sued for and ultimately won a state court judgment to enforce the "homosexuality" penalty.

Issuing three separate opinions, a panel of the Superior Court of Pennsylvania upheld the the trial court's entry of judgment (App. 2a). Two Justices voted to affirm on separate grounds. Justice Popovich wrote the lead opinion, evaluating DeMuth's penalty as state action, but

finding against Miller on his constitutional claims. Justice Olszewski concurred in the result, however he never reached the constitutional claims because he found no state action. Justice Johnson dissented on all claims relevant here, finding both that there was state action and that it was constitutionally impermissible.

The Pennsylvania Supreme Court declined to review the Superior Court's determination to leave in place the $110,000 judgment against Miller. (App. 1a) It is the propriety of state enforcement of the discriminatory penalty, now reduced to a substantial money judgment, that Petitioner now asks this Court to review.

REASONS FOR GRANTING THE WRIT

I. It Is of Great Public Importance That This Court Resolve the Question of Whether State Action May Be Premised Solely on Anti-Gay Bias.

This case calls upon the Court to make plain that discriminatory state action[2] based solely on antipathy toward gay people lacks any rational basis and is unconstitutional. Although this conclusion is consistent with the Court's holdings in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Heller v. Doe*, 113 S. Ct.

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[2] The state action presented in this case arises from the fact that DeMuth's effort to carry out his additional private intentional act of discrimination cannot be accomplished without the use of state powers. As discussed at II, below, government enforcement of DeMuth's money judgment against Miller based on the "homosexuality" penalty constitutes state action.

2637 (1993), *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), it nevertheless is an issue which has generated substantial confusion and conflict among state and federal courts. The Court has not, but should, settle this important issue because 1) it is the focus of much recent and current public concern and controversy, aspects of which the courts have been called upon to resolve, *see, e.g., Evans, et al. v. Romer*, 882 P.2d 1335 (Colo. 1994); *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995); *Shahar v. Bowers*, 836 F.Supp 859 (N.D. Ga. 1993); *Able, et al. v. United States*, 880 F.Supp. 968 (E.D.N.Y. 1995); 2) it affects determinations made by government itself and by government actors; 3) and it directly affects the lives of a great many lesbians and gay men in the United States, as well as those perceived to be gay, *Jantz v. Muci*, 976 F.2d 623, 629 (10th Cir. 1992).[3]

In *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009 (1985), Justices Brennan and Marshall dissented from the denial of *certiorari* in the case of a high school counselor who was fired when she revealed her bisexuality. He characterized the question posed as "may a State dismiss a public employee based on her bisexual status alone." *Id.* at 1011. Noting that the matter "continues to puzzle lower courts," Justice Brennan wrote:

> Because petitioner's case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer

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[3] For a discussion of employment discrimination against lesbians and gay men and its ill-effects, see 102 Harv. L. Rev. 1508, 1554 *et seq.* The balance of that piece catalogs anti-gay discrimination in most other contexts.

> be ignored, I respectfully dissent from the decision to deny this petition for a writ of certiorari.

Id. at 1018.

Over ten years later, this Court has yet to address that issue, although in those intervening years, the need for it to do so has only grown. The confusion over whether anti-gay sentiment is a sufficient basis for government action against a person has not subsided, while the issue of discrimination against lesbians and gay men has been brought into sharp relief. As more lesbians and gay men choose to be open about who they are, the number of cases concerning sexual orientation discrimination has risen exponentially.

The conflicting opinions issued by the panel of the Pennsylvania Superior Court in themselves exemplify the need for clarification from this Court. Justice Popovich disposed of the argument that a state-enforced penalty on Miller because he is gay violates the constitution, summarily concluding without explanation that the claim "is certainly not in violation of the doctrines of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution." (App. 23a). Justice Johnson, on the other hand, wrote a lengthy dissent, opining that the penalty could not be enforced by a court.

The confusion, however, is not limited to the judges who rendered the order from which petitioner appeals. For instance, the United States Court of Appeals for the Tenth Circuit has said, "examining the case law as it existed in 1988, we do not find a clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation." *Jantz v. Muci*, 976 F.2d 623, 629 (10th Cir. 1992). *Jantz*

was brought under 42 U.S.C. § 1983 by an applicant for a public school teaching position. The court of appeals reversed the district court's finding that Jantz's allegation that he was rejected only because the principal believed him to be gay, if proven, could state a claim. Even as it recognized that this Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), had no bearing on an equal protection claim, the court found that "for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time, cast enough shadow on the area so that any unlawfulness in Defendant's action was not 'apparent' in 1988." *Id.* at 630.

The federal government itself has expressed the view that "the constitutional status of homosexuality is in flux." *Anderson v. Branen*, 799 F. Supp 1490 (S.D.N.Y. 1992). In *Anderson*, the government and three Special Agents of the United States Drug Enforcement Administration took the position that the plaintiffs' allegation that they had been brutally beaten based only on their gay sexual orientation could not state a claim for relief under the equal protection clause because no reasonable official administering such a beating would have understood that he was violating a clearly established constitutional right in doing so. Although the trial court rejected this argument, the simple fact that it is made by the government in defense of behavior by government officials demonstrates both the significant actual impact which a clarification from this Court will have, as well as that the law on this question is perceived as extremely unsettled.

Indeed, notwithstanding the clarity of this Court's holdings that bare bias may not trigger adverse state action, the lower courts have expressed a remarkable degree of confusion in cases concerning anti-gay bias in particular. The acute need for this Court to enunciate how lower courts

must evaluate state action motivated by anti-gay animus is exemplified in the cases described above, and found in a multitude of other cases in the lower state and federal courts. As is further detailed below at III, this case presents that question starkly, with rare clarity, in that it is free of the disputes over purported rational bases that commonly complicate government discrimination cases.

II. The Lower Court's Holding Directly Contradicts This Court's Precedent.

Clearly it is impermissible for state action to serve no purpose other than to further animosity based on an invidious classification. State discrimination which serves no legitimate purpose is required to be invalidated regardless of the level of scrutiny to be accorded the classification at issue. Thus discrimination based on age, mental disability, or even one's status as a "hippie," is impermissible under the equal protection clause when it serves no legitimate purpose, even though age, mental disability, and "hippie" status are not classifications to which heightened scrutiny has been applied. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that Missouri's requirement that judges retire at 70 passed constitutional muster because it does have a rational basis); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (holding that government action may not be based on "mere negative attitudes, or fear"); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest). The Superior Court of Pennsylvania misapprehended this basis principle.

Similarly, entry and enforcement, by a court, of the penalty at issue here is state action.[4] As in *Shelley v. Kraemer*, 334 U.S. 1 (1948) this case "raise[s] the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements." *id.* at 9.

> So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State....But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.

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[4] It is difficult to imagine a more direct invocation of the government's full coercive powers than a court's entry and enforcement of a substantial monetary penalty -- more than twice Miller's annual salary as a DeMuth employee. The court's entry of judgment makes available to DeMuth a panoply of coercive remedies, such as garnishment of Miller's business income and bank accounts, or seizure and sale of his personal and real property, mechanisms of the sort this Court consistently has held to constitute state action. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (reversing holding that an invocation of the aid of state officials to take advantage of state created attachment procedures was insufficient to state a claim, under 42 U.S.C. § 1983); *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), (garnishment is a form of state action); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment and prejudgment attachment procedures evaluated as state action whenever state officers act jointly with a private creditor in securing disputed property); *Jordan v. Fox, et al.*, 20 F.3d 1250 (3d Cir. 1994) (addressing the Commonwealth's enforcement of a confession of judgment contained in a lease between private parties, and finding the entry of the confession and the concomitant invocation of the Commonwealth's enforcement powers to constitute state action).

Id. at 13.

DeMuth's affirmative use of the state's power to impose an onerous financial penalty on Miller for being gay involves the government impermissibly in effectuating his unvarnished desire to punish his former employee in service of his own personal biases. The Superior Court of Pennsylvania's affirmance of such a judgment, with the tacit approval of the State's Supreme Court, flatly contradicts this Court's precedent.

III. The Facts of This Case Provide a Clear and Compelling Vehicle for This Court to Address Discrimination Motivated by Anti-Gay Animus.

There is no dispute in this case that discriminatory animus toward gay people was the exclusive motivation for the penalty provision which DeMuth asks the government to enforce. The intentional discrimination, for its own sake, of the "homosexuality" penalty is apparent on its face. Notably, the penalty was triggered only by a "cause" firing, and by the contract's definition of "cause" to include "homosexuality." There would be no $110,000 penalty if DeMuth fired Miller for any *other* non-performance related reason.

At trial, it was not disputed that discriminatory animus underlay the penalty clause. In his testimony, DeMuth made no effort to veil or explain in any other fashion his discriminatory motivation, or its origin in his personal antipathy toward gay people. That DeMuth considered Miller a desirable employee before he learned that he is gay is also conceded, as is the fact that Miller's performance was unaffected by his sexual orientation, or its disclosure. Nor is there any basis to infer a legitimate

governmental interest in the imposition of a substantial monetary penalty on Miller because he is gay.

At trial, DeMuth testified:

Q Now, as of October 17th, 1990, Mr. Miller was properly discharging his duties?

A I consider homosexuality as cause that incapacitated him from properly discharging his duties.

Q Was he properly discharging his duties with respect to his services as a professional financial consultant as of October 17th, 1990?

A Not if he's a homosexual, as far as I'm concerned.

Q Did any clients tell you that he wasn't taking care of their accounts properly?

A I had some conversations with clients about him over time, as I had with other employees.

Q But he was still on partnership track at that point?

A Prior to that.

Q Prior to that he was. Prior to October 17th?

A Prior to me discovering that he was homosexual.

Q And he was still coming to work?

A He was.

Q He was still putting his hours in?

A Yes, basically, yeah.

Q Still keeping up with all of the necessary paperwork?

A Certainly.

Q So, in other words, the homosexuality didn't prevent him from discharging the technical functions of his position, did it?

A The work was not different after I discovered it than before.

"Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984). The factual simplicity of the scenario drawn by these litigants frames in clear terms the important legal principle which it presents the need to decide. DeMuth's penalty provision embodies his personal antipathy toward gay people. The narrow but fundamental question presented in this case is whether the state's power may be used to enforce the invidiously discriminatory provision. The constitutionality of the government giving effect to private anti-gay bias is rarely presented in the clear and uncomplicated manner found here.

For example, presently pending cases which challenge the "Policy Concerning Homosexuality in the

Armed Forces" all involve analyses that permit distractions from the general questions of the legitimacy and rationality of government discrimination against gay people that are specific to that context. They also introduce arguments concerning the impact of a congressional statement of intent not to discriminate and of deference to the military, given its unique mandate and mission. *Able et al. v. United States*, No. 95-6111 (2nd Cir. filed May 24, 1995); *Thomasson v. Perry*, No. 95-252-A (4th Cir. argued *en banc* Dec. 5, 1995); *Phillips v. Perry*, No. 95-35293 (9th Cir. filed March 31, 1995); *Selland v. Perry*, No. CIV. Y-95-1145, 1995 WL 642998 (D. Md. Oct. 31, 1995). Similarly, cases which have presented anti-gay discrimination outside the military have often arisen in the context of employment by law enforcement agencies in states which still criminalize some adult consensual sexual behaviors. In those cases the question of whether the discrimination is permissible becomes muddled -- however unfairly -- by the defendants' insistence that, at least in those specific contexts, it has a legitimate purpose. *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Shahar v. Bowers*, 836 F.Supp 859 (N.D. Ga. 1993). Finally, other recent government employment cases were infected with the myth -- now acknowledged to be unfounded[5] -- that lesbians and gay men pose a particular security risk, by virtue of their sexual orientation. *Padula, supra*; *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Doe v. Casey*, 796 F.2d 1508

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[5] Exec. Order No. 12,968, 60 Fed. Reg. 40245 (1995).

(D.C. Cir. 1986).[6]

This case presents a core issue, unmuddled and without distraction: whether or not state action can target an individual simply because of his sexual orientation as a gay man.

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[6] In addition, as with the vast majority of cases concerning employment discrimination of any sort, many sexual orientation cases also devolve into factual disputes over whether the discrimination itself ever occurred, with employers commonly alleging entirely other, purportedly non-discriminatory reasons for their hiring, firing, or promotion decisions. *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992) (denying any discriminatory intent against gays and alleging that the other candidate was better qualified); *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 (4th Cir. 1974) (where teacher did not come out on his application, public school alleged that it was the teacher's non-disclosure of his sexual orientation, rather his *being* gay that justified his punishment); *Singer v. United States Civil Service Comm'n*, 530 F.2d 247 (9th Cir. 1976) (where employee *did* come out, government interest in promoting efficiency held to overcome his first amendment rights because he was accused of "publicly flaunting" who he was).

CONCLUSION

This case requires that this Court clarify, once and for all, that anti-gay animus is no more permitted to be enforced by state action than is any other form of invidious discrimination. The public importance of the issue presented, taken with its timeliness and the clarity of its presentation at bar mandate that this Court grant *certiorari* in order to free Miller from the onerous penalty to which the court subjected him because he is gay.

Respectfully submitted,

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Dated: December 7, 1995

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DONALD DEMUTH	:	No. 73 M.D.
	:	Alloc. Dkt. 1995
Respondent	:	
	:	Petition for Allowance
v.	:	of Appeal from Order
	:	of the Superior Court
DANIEL C. MILLER	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 8th day of September, 1995, the Petition for Allowance of Appeal and the Cross-Petition for Allowance of Appeal are denied.

Mr. Justice Montemuro is sitting by designation.

DONALD L. DeMUTH,	:	IN THE SUPERIOR
	:	COURT OF
Appellee,	:	PENNSYLVANIA
	:	
v.	:	
	:	
DANIEL C. MILLER,	:	
	:	No. 00027
Appellant.	:	Harrisburg 1994

Appeal from the Judgment of the Court of Common Pleas of Cumberland County, Civil Division at No. 4072 CIVIL 1991.

BEFORE: OLSZEWSKI, POPOVICH and JOHNSON, JJ.

OPINION BY POPOVICH, Judge:

This case involves an appeal from the order (reduced to judgment) of the Court of Common Pleas of Cumberland County denying a motion for judgment notwithstanding the verdict and a new trial by the defendant/appellant, Daniel C. Miller. We affirm.

The facts, viewed in a light most favorable to the verdict-winner and granting all reasonable inferences to be drawn therefrom, reveal that the defendant was hired by the plaintiff, Donald L. DeMuth, in December of 1985 as an independent contractor to do accounting work. In May of 1986, the defendant became an employee of the DeMuth firm as a professional management consultant and signed an employment contract to that effect for one year (June 1, 1986, to May 31, 1987). This business relationship was renewed on a fiscal basis for each of the next four years, but executed copies of employment contracts could be

produced for only two of those years. More specifically, the plaintiff could not locate, but recalls signing, a contract dated May 31, 1989, and expiring June 1, 1990. Each of the contracts, save for 1986, contained the following language:

> 8. *Contingent Note Payable*: If within five years of the termination of this Agreement if the Employee terminates the Agreement or the Employer terminates the Agreement for cause, and the Employee establishes a professional management consulting or accounting firm within a 50-mile radius of any of Employer's current or former clients, he agrees to pay the Employer 125% of the previous 12 months' charges for each of the employer's clients who retain his professional management consulting or accounting services. Cause shall include, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer's family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and homosexuality.

See Paragraph 8, Reproduced Record at 13a.

On October 17, 1990, the plaintiff called the defendant into the office and terminated his employment because of his appearance on a Harrisburg television station representing a gay and lesbian coalition in violation of Paragraph 8. After leaving the plaintiff's employ, the defendant opened a competing consulting firm and solicited the plaintiff's clients, some of whom (17 in number)

changed their business allegiance to the defendant. Once the plaintiff learned of this, the defendant was notified that such conduct violated the employment agreement. See Paragraph 8, supra.

When the defendant refused to compensate the plaintiff for the loss of business, a two-count complaint sounding in contract and misappropriation of the plaintiff's property rights was filed seeking judgment in excess of $120,000.00. The defendant's reply was an answer denying, inter alia, the existence of a written contract for the last year of his employment, thus negating the effectiveness of Paragraph 8. Under new matter, the defendant averred that his dismissal was premised upon the "homosexual" provision of the employment contract and his television interview concerning a controversial issue (gay and lesbian bashing), the former of which was violative of public policy.

In a counterclaim, the defendant alleged that he had been: wrongfully discharged for appearing on television in support of gay/lesbian rights; defamed when the plaintiff communicated to third parties that he was gay and at the risk of AIDS if a continuing work relationship was contemplated; and contractually interfered with by the plaintiff as to clients.

At the commencement of trial, the defendant argued a motion in limine to exclude any testimony by the plaintiff that the contract continued in effect until the termination date (October 17, 1990) on the ground that "there was a judicial admission in the [plaintiff's] pleadings that it had not been renewed." The plaintiff countered that the provision allowing dismissal for "homosexuality" persisted because of the dealings of the parties. The court agreed

with the plaintiff and allowed testimony on the parties' business dealings post-May 31, 1989.

The parties stipulated that damages did not exceed (under the 125% provision of actual loss) $110,000.00 and the defendant's wrongful discharge claim was excluded on the plaintiff's motion for compulsory non-suit. Thereafter, in answer to special interrogatories, the jury held that the parties were bound by the terms of the 1990 Agreement as a consequence of their post-1989 conduct leading up to and encompassing the defendant's dismissal (October 17, 1990). Damages were awarded (and later molded by the court) in the amount of $110,000.00. Post-trial motions were denied. This appeal followed and raises three issues, the first of which to be addressed concerns the allegation that the trial court erred in allowing the plaintiff to present evidence in support of his contractual claim when the plaintiff had "judicial[ly] admi[tted] in his complaint that the employment agreement ... was not renewed or extended at its expiration on May 31, 1990."

> It is well established that a judicial admission is an express waiver made in court or preparatory to trial by a party or his attorney, conceding for the purposes of trial, the truth of the admission. *Jewelcor Jewelers & Distributors, Inc. v. Corr*, 373 Pa.Super. 536, 542, 542 A.2d 72, 75 (1988). It has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the opposing party need offer no evidence to prove it and the party by whom the statement was made is not allowed to disprove it. *Jewelcor Jewelers*, supra, at 542, 542 A.2d at 75. *A principal element of a judicial admission is that the fact has been*

admitted for the advantage of the admitting party, and consequently, a judicial admission cannot be subsequently contradicted by the party that made it. *Jewelcor Jewelers*, supra, at 543; 542 A.2d at 76. As our Supreme Court stated:

> Pennsylvania has followed this rule since *Wills v. Kane*, 2 Grant 60, 63 (Pa.1853), where the court insisted: *"Where a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice."*

Jewelcor Jewelers, supra, at 542; 542 A.2d at 75 (quoting *Tops Apparel Mfg. Co. v. Rothman*, 430 Pa. 583, 587-88 n. 8, 244 A.2d 436, 438 n. 8 (1968) (emphasis added).

Nasim v. Shamrock Welding Supply Co., 387 Pa.Super. 225, 563 A.2d 1266, 1267-1268 (1989) (Emphasis added in part).

In the present case, we hold that the averment of fact contained in Paragraph 5 of the plaintiff's complaint (i.e., the employment contract "was not renewed or extended at its expiration on 31 May 1990") did not constitute a judicial admission as the averment was not advantageous to the plaintiff when viewed in the context of the remaining

allegations and damages sought to be recouped. In pertinent part, the complaint reads:

> 4. Pursuant to an Employment Agreement dated 31 May 1989, Plaintiff employed Defendant. A copy of said Employment Agreement is attached hereto and marked as Exhibit A.
>
> 5. *The Employment Agreement between the parties was not renewed or extended at its expiration on 31 May 1990.*
>
> 6. Following the expiration of the Employment Agreement between the parties, Defendant continued to be employed by Plaintiff and continued to be paid a salary and other compensation for such employment.
>
> 7. On 17 October 1990, Plaintiff terminated Defendant's employment.
>
> 8. Following termination of his employment, Defendant solicited a large number of the clients served by Plaintiff's business during the time that Defendant was employed in that business, suggesting and requesting that those clients terminate the services of Plaintiff and retain Defendant to provide those professional services to the clients in the future.
>
> 9. As a result of Defendant's solicitation of and contacts with Plaintiff's clients following the termination of Defendant's employment by Plaintiff, several of Plaintiff's clients have terminated Plaintiff's services. Plaintiff

believes that many of those clients have now retained the services of Defendant and that Defendant is providing professional accounting and business management services to those clients.

COUNT I
CONTRACT CLAIM

10. ...

11. To the extent that the Employment Agreement of 31 May 1989 was in effect in October of 1990, Defendant is bound and obligated by the terms of that agreement.

12. Defendant's employment with Plaintiff was terminated by Plaintiff for cause as such cause is defined in Paragraph 8 of said agreement.

13. Pursuant to Paragraph 8, Defendant owes Plaintiff a sum of money equal to 125 percent of the previous twelve months' charges for each of Plaintiff's clients who retained Defendant to provide professional services for them following his termination.

14. Plaintiff believes that the clients of Plaintiff who are now served by Defendant are those clients listed on Exhibit B which is attached hereto. The previous twelve months' charges for each of those clients is set out next to the clients name on said schedule and totals $98,918.75.

15. Pursuant to Paragraph 8 of the Employment Agreement between the parties, and to the extent said Employment Agreement was still in effect and still binding as of October, 1990, Plaintiff owes Defendant the sum of $123,648.43.

16. Defendant is indebted to Plaintiff in the sum of $123,648.43. Despite repeated demands by Plaintiff, Defendant had failed and refused to pay said sum.

WHEREFORE, Plaintiff demands judgment against Defendant in the amount of $123,648.43, plus interest from 30 November 1990, plus costs of suit.

Viewed in a vacuum, the allegation in Paragraph 5, supra, would appear to bind the plaintiff to the assertion therein of non-existence of the contractual relationship between the parties. However, reading the complaint as a whole, we find that the "non-renewal, non-extension" averment was tempered by the allegations in the remaining portions of the complaint (which were echoed at the trial as well) that the contractual relationship "continued" between the parties past the 31 May 1989 term of the written and executed agreement of employment with the payment of wages and benefits for services rendered by the defendant up until dismissal in 1990.

The defendant's homosexual activity triggered his dismissal for cause under the terms of the extended 1989 contract and suit was instituted for his solicitation of the plaintiff's clients consistent with language of the same Agreement continued by the parties' conduct until October 17, 1990.

To hold that the content of Paragraphs 5's "non-renewal" language is a judicial admission foreclosing the plaintiff from looking to Paragraph 8's dismissal for "cause" and compensation proviso of the 1989 written contract flies in the face of treating something as a judicial admission only if it is advantageous to the admitting party. Contrast Nasim, supra, and compare with *Jewelcor Jewelers & Distributors, Inc. v. Corr*, 373 Pa.Super. 536, 542, 542 A.2d 72, 75 (1988).

Instantly, we fail to discern how it would be beneficial to the plaintiff to treat as an admission the expiration of the contract containing verbiage entitling him to dismiss the defendant for cause and seeking compensation for violation of the non-competition clause. Id. Accordingly, given the non- beneficial aspects flowing from labelling Paragraph 5 as an admission (so as to preclude the plaintiff from offering evidence of the defendant's conduct as violative of a contract), we hold that Paragraph 5 does not rise to the level of a judicial admission. Id.

The conclusion that the viability of the contractual relationship between the parties was unresolved opened the door for the jury to assess the contradictory versions of conduct and behavior surrounding the renewal procedures practiced by the parties with the formal expiration of a contractual period and the continuation of its terms thereafter. This is consistent with established case law; to-wit:

> "[W]hen a contract of employment for a definite time is made and the employee's services are continued after the expiration of the time, without objection, the inference is that the parties have assented to another contract for a term of the same length with

> the same salary and conditions of service." *Smith v. Shallcross, et al.*, 165 Pa.Super. 472, 475, 69 A.2d 156, 158 (1949). "If an agent is employed for a specified period of a year or less and thereafter continues in the employment, without further arrangements being made, it ordinarily is inferred that the employment continues upon the same terms and for a similar period as that for which he was first employed." Id. at 476, 69 A.2d at 158-159. See also *P.L.E. Labor* § 9.

Burge v. Western Pa. Higher Education Council, Inc., 391 Pa.Super. 108, 570 A.2d 536, 538 (1990).

It was the defendant's testimony that one-year contracts were signed with the plaintiff in 1986, 1987 and 1988, with no agreement being signed in 1989 and for the period from June of 1990 to October of 1990. Even though the first three contracts contained the "homosexual" provision as "cause" for dismissal, the defendant never confronted the plaintiff (except in passing) with its exclusion since he did not want to jeopardize his employment by making it an issue pivotal to his remaining on the job.

In fact, the defendant testified that no extension of his June 1, 1988, to May 31, 1989, contract was signed because he "wanted to negotiate th[e] issue" of calculating his bonus not on hours worked but on his productivity. This was refuted by the plaintiff, who took the stand and admitted that he could not produce the May 31, 1989, contract, but he swore that such a document was executed by the defendant and he witnessed the signing. N.T. 6/21/93 at 18-19.

Despite the defendant's refutation of an employment contract after May 31, 1989, he remained on the job thereafter until the date of his termination and received wages and benefits during this employment period such that his salary had risen from $32,500.00 to $50,000.00 (plus benefits) for the time in question. Further, both parties agreed that it was not unusual for a formal contract to be signed 4-5 months into the new fiscal year, with increments in pay being made retroactive to June 1st of that work year. Id. at 25-26.

For example, after the expiration of the contract on May 31, 1989, it was the defendant's contention that no other contract was signed because the bonus features had to be resolved. This element was agreed upon in February of 1990, with the bonus paid according to its terms. N.T. 6/22-23/93 at 48-51. Thus, the employment relationship continued uninterrupted and its attendant terms and conditions were part and parcel of the work environment up until the defendant's termination date. See *Burge*, supra. As such, we assign no error to the trial court's allowance of testimony on the employment relationship during that period where no written contract could be produced (from May 31, 1989, to the date of the defendant's dismissal), which we find was proper under accepted principles of law concerning the continuation of contracts and their conditions beyond the written period of their existence. Id.

The next issue to be proffered relates to the claim that the "contingent note payable" clause of the employment contract is a penalty clause, or, alternatively, an unreasonable restrictive covenant. Our review of the record discloses that this issue was not raised in pre-trial, trial or post-trial motions. Furthermore, the trial court did not address it in its opinion to this Court. Therefore, we find it waived for appeal purposes. See *McGonagle v. Union*

Fidelity Corp., 383 Pa.Super. 223, 556 A.2d 878, 881 n. 3 (1989); see also *Commonwealth v. Sheaff*, 518 Pa. 655, 544 A.2d 1342 (1988), reversing *Commonwealth v. Sheaff*, 365 Pa.Super. 613, 530 A.2d 480 (1987).

The last of the appellant's complaints consists of a general challenge to his termination as violative of public policy, followed by a list of sub- issues aimed at assailing the loss of employment on federal and state constitutional grounds. See Appellant's Brief at i-ii.

The constitutional arguments appear for the first time in the appellant's appellate brief. An examination of the pleadings, pre-trial memoranda, arguments before trial and at the compulsory non-suit and direct verdict stages of the case, as well as in post-trial motions, are devoid of any mention of the constitutional grounds offered in the appellant's appellate brief as justification to entry of judgment notwithstanding the verdict or a new trial. This lack of presentment of such a theory for relief would normally be fatal to preservation of such grounds on appeal. However, the trial court addressed the constitutional challenges in its opinion. The reason for and timing of such a response by the trial court was the result of "[t]hose arguments [being] first made when Miller filed his brief in support of the post-trial motions, which occurred after he changed counsel."[1] See Appellee's Brief at 6. The trial

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[1] From the record we glean the following sequence of events: 1) June 30, 1993, the defendant's post-trial motions were filed; 2) September 23, 1993, the defendant's attorney's petition for admission pro hac vice was granted; 3) November 24, 1993, trial counsel's petition to withdraw and new counsel's entry filed; and 4) December 20, 1993, trial court granted post-trial motions in part.

court, having exercised its discretion in responding to the constitutional issues raised in the defendant's post-trial brief and at oral argument, preserved such claims for appellate review. See *Thatchers Drugs of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, 391 Pa.Super. 524, 571 A.2d 490, 494 (1990), reversed on other grounds, 535 Pa. 469, 636 A.2d 156 (1994), where we observed on this exact issue that:

> ... there has been a shift in this Court's approach to dealing with issues not timely filed below but addressed, nevertheless, by the trial court on their merits (without leave of court being sought and granted in advance of submission).
>
> For example, in *Commonwealth v. Hewett*, 380 Pa.Super. 334, 551 A.2d 1080 (1988), a panel of this Court did not find an issue waived even though it was raised in supplemental post-trial motions without the benefit of leave of court being obtained as required by Pa.R.Crim.P. 1123(a). We did so on the strength of the Supreme Court's reversal of Superior Court treating as waived an issue raised for the first time in supplemental post-trial motions without leave of court being obtained beforehand because the *trial court elected to treat the issue on its merits*. Reliance was had upon the Supreme Court's per curiam reversal order in *Commonwealth v. Sheaff*, 518 Pa. 655, 544 A.2d 1342 (1988), of this Court's panel decision finding waiver in *Commonwealth v. Sheaff*, 365 Pa.Super. 613, 530 A.2d 480

> (1987). Accord *Commonwealth v. Markovich*, 388 Pa.Super. 244, 247-49, 565 A.2d 468, 470 (1989); cf. *Kurtas v. Kurtas*, 521 Pa. 105, 109, 555 A.2d 804, 806 (1988) (plurality). As such, we will respond to the appellant's claim that the Statute of Frauds precluded the court below from restricting the use it made of its leased premises. In doing so, we would note that the issue is preserved not solely because of its appearance in the appellant's post-trial supplemental brief. Rather, we address the question because of its presence in the supplemental brief, counsel's oral argument on the issue before the trial court and the trial court exercising its discretion to address the Statute of Frauds matter.[2] Cf. Weis by *Gasper v. Estate of Ciao*, 521 Pa. 491, 556 A.2d 819 (1989). [Emphasis in original]

Accord *Commonwealth v. Austin*, 428 Pa.Super. 466, 631 A.2d 625 (1993); contrast *Commonwealth v. Metz*, 534 Pa. 341, 633 A.2d 125 (1993).

Despite the appellee's protestation that the trial court did not have the opportunity to digest or respond to the

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[2] Interestingly, the Statute of Frauds issue upon which Superior Court was reversed was the issue Superior Court found preserved even though raised for the first time in the appellant's post-trial supplemental brief, argued at oral argument and addressed by the trial court despite the appellee's waiver contention. The Pennsylvania Supreme Court did not question the propriety of the preservation issue.

appellant's public policy and constitutional arguments, the trial court's opinion indicates otherwise; to-wit:

> The defendant first suggests that the judgment must be entered, notwithstanding the verdict, for the reason that the contract whereby the plaintiff was permitted to fire the defendant for being gay violated either public policy or state and federal constitutions.

Trial Court Opinion, 12/10/93 at 3. The court then proceeded to find meritless the specific arguments raised on the grounds that "there was no factual record made with respect to the due process or public policy claim [and there was no] current legislative or societal consensus on these matters ... justif[ying the court] in defining public policy based on what [the court] thought it should be." Id. at 6.

Therefore, consistent with the precept re-confirmed by our Supreme Court in *Sheaff*, supra, and looked to in *Thatcher's Drugs*, supra, to find an issue preserved where raised for the first time in a post-trial supplemental brief and addressed by the trial court on its merits, we can do no less here and find the public policy and constitutional issues preserved for appellate scrutiny. Id.

It is imperative that we focus on exactly what issue(s) the appellant seeks to have reviewed under the caption of "public policy," as well as the federal and state constitutional assertions, before we may embark on an analysis of the viability of the claim(s) raised. To assist us in this objective, we look to the appellant's appellate brief at 10-11, labelled "Summary Of Argument", which reads in pertinent part:

> This case involves plaintiff's attempt to use the state's power, and the resources of this court, to enforce monetarily, his punitive policy of discrimination. *Not content with having fired a qualified employee solely because he is gay (which decision is not challenged here), plaintiff sought to go further and to employ the courts' assistance in collecting a money judgment provided for in the unconscionable contract clause at issue.*
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> * * * * * * * * * * * * * *
>
> It was defendant's position throughout that even had the contract relied upon by plaintiff been renewed by inference, its terms were unenforceable because the federal and Pennsylvania constitutions do not permit judicial enforcement of DeMuth's blatantly discriminatory interference with Miller's right to practice his profession without regard to his sexual orientation, or any other irrational classification. [Emphasis added]

At first blush, it appears that appellate counsel seeks to invalidate Paragraph 8's 125% penalty provision, which prohibits the appellant from initiating a competitive business within 50 miles of the appellee's clients and within 5 years of leaving the appellee's employ. "It is the court's enforcement of that penalty [provision] which constitutes state action, and which is at issue in this appeal." Id. Yet, the issue is clouded by the appellant linking the enforceability of Paragraph 8 to a form of punishment for his sexual preference under the guise of constitutional law (federal and state) or public policy.

One cannot state that the dismissal aspect of the case is not being challenged, then in the next breath equate the enforcement of a non-competition clause as appears in Paragraph 8 as an endorsement of discrimination premised upon sexual orientation violative of constitutional law and public policy. As a result, we do not read the appellant's position to be one of assailing his termination of employment because of sexual orientation as violative of public policy or constitutional law, be it state or federal in scope. Rather, we interpret the appellant's complaint to consist of a challenge to the enforcement of the non-competition clause as proscribed by public policy, statutory law, or federal or state constitutional law.

To explicate, the money damages awarded the plaintiff were not because the defendant was a homosexual. On the contrary, an award in favor of the plaintiff was made with the jury's finding that the defendant had violated the non-competition clause of the contract by soliciting seventeen (17) clients of the plaintiff. This is the only logical inference to be drawn from the verdict in light of evidence wherein the parties stipulated to money damages of $110,000.00 on the contract claim. See N.T. 6/22-23/93 at 99; Plaintiff's Complaint, Paragraph 13. To hold that the jury could issue damages in the amount stated because the defendant breached the terms of the contract solely for being a homosexual would be at odds with the clear language of the agreement allowing for a 125% penalty payment if the defendant were to compete with the plaintiff within 50 miles and 5 years after terminating his employment.

Because we view the plaintiff's suit as one seeking remuneration for a loss of business attributable to the defendant's solicitation of his clients, which activated Paragraph 8 of the contract allowing for damages of "125

percent of the previous twelve months' charges for each of Plaintiff's clients who retained Defendant to provide professional services for them following his termination," (see Complaint, Paragraph 13), we focus on the propriety of the non-competition clause. Nevertheless, with the defendant's failure to mount an assault on this segment of the contract at any level of this lawsuit, we find the matter waived. See *McGonagle*, supra.

Lastly, we turn to the appellant's contention that this Commonwealth's courts' enforcement of the penalty provision (restrictive covenant) of the contract constitutes state action violative of the equal protection and due process clause of the federal and Pennsylvania Constitutions.

"A plaintiff suing for an alleged breach of his constitutional rights has an obvious burden of proving the existence of those facts which make out the breach." *Doe v. Gates*, 981 F.2d 1316, 1323 (D.C.Cir.1993). Here, the appellant has pointed to no evidence to show such a breach.[3]

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[3] The appellant cites *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), for the proposition that a state court's enforcement of a penalty provision of a restrictive covenant based on one's race or color constitutes state action allowing for the scrutiny of such penalty provision under the federal constitution's Fourteenth Amendment due process and equal protection precepts.

In *Shelley*, homeowners had executed contracts with clauses restricting the sale of their real estate to Caucasians. When some homes were sold to blacks, the remaining homeowners filed suit to enforce the restrictive covenants. The United States Supreme Court noted that the inhibitions of the constitutional provisions applied only to governmental action and not to actions between private property owners. Nonetheless, the

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Court ultimately ruled that the restrictive covenants constituted a pattern of discrimination violative of the Fourteenth Amendment; to-wit:

> We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.
>
> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the frames of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the

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> States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder v. West Virginia*, supra, 100 U.S. [303] at 307, 25 L.Ed. 664 (1879). *Only recently this Court has had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. Oyama v. California*, 1948, 332 U.S. 633, 68 S.Ct. 269. Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police powers. Cf. *Buchanan v. Warley*, supra.

334 U.S. at 20-21, 68 S.Ct. at 846 (Footnotes omitted; emphasis added). Protections against discrimination in the enjoyment of property rights comes within the ambit of the Fourteenth Amendment; to-wit:

> The Supreme Court has long held that the constitutional guarantee of due process extends to protect property interests, broadly defined as the "interests that a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548 (1972). Property interests in employment are not themselves constitutionally created; rather, they are derived from independent sources, such as statutes, regulations, ordinances, or "existing rules or understandings ... that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577, 92 S.Ct. at 2709;

At trial, the plaintiff testified that the defendant was not discharged only because of his sexual predilections. It was the fact that the defendant communicated on a local television station his views concerning a controversial issue (gay and lesbian bashing on behalf of a Harrisburg organization opposed to such conduct). The plaintiff

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Perry v. Sindermann, 408 U.S. 593, 601-02, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972). The rules and understandings on which an employee bases his Fifth Amendment claims, however, must create an "objectively reasonable expectation" of continued employment. *Hall v. Ford*, 856 F.2d 255, 266 (D.C.Cir.1988).

Doe v. Gates, 981 F.2d 1316, 1320 (D.C.Cir.1993).

Shelley and *Doe*, supra, acknowledge the existence of property rights which may not be infringed by discriminatory action violative of the U.S. Constitution. Instantly, however, the appellant is not complaining about the denial of a property right (employment), an issue the appellant excluded specifically from appellate review in his brief at 9. This restricts the appellant's argument on appeal to the implementation of a penalty provision claimed to be violative of his federal and State constitutional rights to due process and equal protection.

We find that Paragraph 8's penalty section is not at odds with the appellant's constitutional rights. It was triggered with the appellant's dismissal for espousing homosexual views reflective of his employment status. It was not until the appellant set up a competing business against the plaintiff with customers from the plaintiff that suit was instituted in compliance with Paragraph 8. This aspect of the contract is not challenged and was agreed to by the appellant without objection or any attempt to renegotiate its terms. Thus, the appellant will not be heard to complain now of its enforcement.

believed that such outspoken remarks by the defendant would be imputed to the business because of the defendant's employee status. Further, clients and prospective clients might be offended by the remarks and choose not to do business with the plaintiff's firm. Also, the plaintiff made reference to his loss of trust in the defendant with regard to business dealings given the defendant's failure to disclose his homosexuality during the 5 years of employment.

At bar, the appellant has not claimed to have been treated discriminatorily because he is a male, but rather because he is a homosexual who chose to publicize his sexual preference. This type of claim is not actionable under any Pennsylvania statute or its constitution and is certainly not in violation of the doctrines of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. See *Holloway v. Arthur Andersen and Co.*, 566 F.2d 659, 644 (9th Cir.1977); *Acanfora v. Bd. of Education of Montgomery Cty.*, 491 F.2d 498 (4th Cir.1974), *cert. denied*, 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d 63 (1974).

It surely follows that, because the defendant agreed to the terms of his contract for a period of 5 years without objection or renegotiation, he must be held to adhere to its (non-competition) terms, absent any evidence of a clear violation of public policy which we have not detected here. The courts, as extensions of the state, may not intervene to protect employees from treatment that is merely arbitrary or unfair, the remedy for which is resignation or renegotiation of the terms of employment. The appellant intended doing the latter but never took the initiative. See *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985).

Further, our review of the record indicates that the appellee's suit was more the product of the appellant's opening a competing business and soliciting some of the appellee's clients in the course of doing so and not because of any sexual predilections of the appellant.

Had the appellee not lost his clients and money to the appellant's competing business, it is unlikely that any lawsuit would have been instituted. See Plaintiff's Complaint, Paragraphs 8, 9, 13-16. But, with the non-competition clause in effect and agreed to by the appellant, enforcement of its terms was proper under the circumstances of this case without violating any public policy or constitutional positions regarding homosexuals and the private sector employment arena. The absence of evidence to the contrary undermines the appellant's request for either judgment notwithstanding the verdict or a new trial.[4]

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[4] Parenthetically, we would note that the appellant's arguments of discrimination in the work place, directed at gays and lesbians, would be better directed toward the Legislature (the real body politic) to effectuate a change in the treatment of those whose sexual preferences impact upon their work environment. See *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456 (N.D.Calif.1975); Siniscalco, Gary R., *Homosexual Discrimination in Employment*, 16 Santa Clara L.Rev. 495 (1976).

The altering of societal norms is a process which is incremental at best, but we are not presented with the legal and factual scenario requiring our inquiry into the area to accelerate change which affects homosexuals in the work environment. This will be left for another day where the issues are preserved and articulated with clarity and not requiring this Court to extend itself to reach for issues to decide where none exist in the record

Judgment affirmed.

OLSZEWSKI, J., files a Concurring Opinion.

JOHNSON, J., files a Concurring and Dissenting Opinion.

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as presented on appeal. The appellant's contentions to the contrary are not persuasive.

CONCURRING OPINION BY OLSZEWSKI, J.:

I concur in the result.

While I agree with the majority's well-reasoned disposition of the first two issues, I respectfully disagree with the treatment of the constitutional issue. Appellant challenges the trial court's enforcement of a private non-competition agreement on equal protection grounds. Since I believe that court enforcement of this covenant not to compete does not involve any state action in the constitutional sense, I would decline appellant's invitation to reach out and needlessly decide a very difficult and sensitive constitutional issue.

Appellant asserts that judicial enforcement of the covenant not to compete in paragraph 8 of his employment contract would constitute state action, so as to implicate the United States and Pennsylvania Constitutions. For support, appellant cites to *Shelley v. Kraemer* and its progeny. 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). A careful review of the purpose and the holding of *Shelley* leads me to the conclusion that the judicial conduct at issue here has no constitutional dimension.

The doctrine of state action that arose from *Shelley* was effectively capsulized in *Palmore v. Sidoti*, where the United States Supreme Court stated that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421, 426 (1984) (emphasis added). Thus, in searching for state action, we look for either direct or indirect support, by a court, of a private discrimination or bias. See *id.*

In the most egregious illustration of direct support of private discrimination, *Shelley v. Kraemer*, a court would, in effect, have coerced such discrimination by enforcing a racially restrictive covenant.[1] 334 U.S. at 31, 68 S.Ct. at 845, 92 L.Ed. at 1183. In a similar situation in *Barrows v. Jackson*,[2] the Supreme Court wrote, "[i]f the state may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant." 346 U.S. 249, 253-4, 73 S.Ct. 1031, 1033, 97 L.Ed. 1586, 1594 (1953). These cases illustrate situations where the state action is found in a court's direct, coercive support of private discrimination.

In this case, we have no similar coercion. Analogizing the facts of *Shelley* to this case suggests the following scenario: DeMuth includes a clause in all employment contracts in which he, as the employer, promises to fire any employee found to be a homosexual. After hiring Miller, DeMuth finds out that Miller is a homosexual. DeMuth, however, decides not to fire Miller and another employee sues DeMuth seeking to enforce Demuth's discriminatory promise. If a court enforced

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[1] In *Shelley*, a group of homeowners signed contracts that prohibited the sale of their homes to anyone other than Caucasians. 334 U.S. at 5-6, 68 S.Ct. at 838-39, 92 L.Ed. at 1176-77. When several of the homeowners defied the contracts and sold to African-Americans, the remaining homeowners sued for an injunction seeking to block the sales. Id.

[2] In *Barrows*, homeowners sued for damages against a fellow homeowner who initially signed a racially restrictive covenant, but then sought to sell her land in violation of the covenant. 346 U.S. 249, 251-52, 73 S.Ct. 1031, 1032-33, 97 L.Ed. 1586, 1592-93 (1953).

DeMuth's promise, it would be coercing private discrimination. Since this hypothetical scenario is not present here, *Shelley* is not directly applicable.

A step further removed is an instance where the court is not coercing one to discriminate, but is directly supporting private discrimination by enforcing a direct penalty against an individual based on discriminatory bias. Under *Palmore*, this kind of direct support would still qualify as state action. 466 U.S. at 433, 104 S.Ct. at 1882, 80 L.Ed.2d at 426. This direct support, however, is also not present here.

An example of such direct support would be the following scenario: DeMuth and Miller sign a contract stating that if DeMuth found out that Miller was a homosexual, Miller will refund all of the salary that he received from DeMuth since the date he was hired. If DeMuth then found out about Miller's sexual preference and Miller refused to pay, DeMuth would need to sue under the contract for damages. A court's enforcement of this contract would be an example of direct support of a private bias.

In contrast to this hypothetical contract, the actual contract at issue here does not seek to directly penalize Miller for his sexual preference. Rather, it seeks to directly penalize Miller for his business competition with DeMuth in violation of Miller's written promise not to compete. Thus, court enforcement of this covenant not to compete does not lend direct support or give direct effect to a private bias.

According to *Palmore*, a court also cannot indirectly support or give effect to a private bias. Id. This area of indirect support is a delicate one, however, as it was not the intention of the Supreme Court to convert all private actions

into state actions based solely on judicial enforcement of a private contract. See *Luria Brothers and Company v. Allen*, 672 F.2d 347, 354 (3rd Cir.1982) (holding that judicial enforcement of a contract cannot convert what would otherwise be a private matter into state action) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185, 199 (1978)); see also *Wilco Electronic Systems v. Davis*, 375 Pa.Super. 109, 114, 543 A.2d 1202, 1205 (1988), *appeal denied*, 520 Pa. 619, 554 A.2d 511 (1988). Therefore, we must be cautious in characterizing a court's involvement as indirect support, lest we transform all private acts into acts of the state. After careful examination of this case with these doctrinal limits in mind, I believe that court enforcement of the covenant not to compete fails to rise to the level of even indirect support for private discrimination.

DeMuth's suit for damages based on the covenant not to compete does not require any court involvement at all in the alleged discrimination. Miller specifically states that he is not challenging the validity of his termination, which admittedly was on the grounds of his homosexuality. Brief for appellant at 10-11. The issue raised is simply whether a court's enforcement of a non-competition clause in an employment agreement violates federal or state constitutional law.

The non-competition clause at issue reads:

> 8. Contingent Note Payable: If within five years of the termination of this Agreement if the Employee terminates the Agreement or the Employer terminates the Agreement for cause, and the Employee establishes a professional management

> consulting or accounting firm within a 50-mile radius of any of Employer's current or former clients, he agrees to pay the Employer 125% of the previous 12 months' charges for each of the employer's clients who retain his professional management consulting or accounting services. Cause shall include, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer's family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and homosexuality.

R.R. at 13a. Appellee DeMuth admitted that he fired Miller for his alleged homosexuality. That firing, however, is a done deal and Miller is not now challenging it. There was simply no court involvement in Miller's termination.

Court involvement began after Miller's termination. Instead of being asked to enforce any alleged discrimination or illegal termination, this Court is merely being asked to enforce a private, consensual contract clause in which Miller promises not to compete with DeMuth after their employment relationship is over. The clause could have been triggered for any number of "causes", and after any one of the triggers, this Court's involvement would have been the same: enforcing a standard non-competition clause in a private agreement by its stated terms. In terms of the court's enforcement of the clause, the reason appellant was originally fired is not an issue.

If this clause had not listed homosexuality as "cause" and DeMuth had sought to enforce it after firing Miller, then the reasons for Miller's termination would be at issue.

We would then be required to determine whether Miller's sexual preference constituted "cause" for his termination, and this determination would arguably present an instance of indirect support. In the present case, however, the parties have addressed and resolved that issue privately. This Court need only enforce Miller's promise not to compete with DeMuth if he were to quit or be fired for cause. By enforcing this promise, we are not expressing approval of the reasons for Miller's termination. We are simply saying that Miller, like anyone else, homosexual or heterosexual, must abide by his own written promise not to compete with his ex-employer for a certain number of years. I believe that under these circumstances, a court's enforcement of the bargained-for economic rights of the parties does not constitute indirect support for private discrimination. Thus, even if we were to assume that discrimination on the basis of sexual preference violates equal protection, there is no state action and neither the federal or state constitutions are implicated. I concur in the majority's result, but feel that the constitutional discussion was unnecessary.

CONCURRING AND DISSENTING OPINION BY JOHNSON, Judge.:

In this action for breach of an employment contract, Daniel C. Miller appeals from the judgment entered on a jury verdict in favor of Donald L. DeMuth.

On appeal, Miller argues that the trial court erred in (1) allowing DeMuth to present his contract claim despite DeMuth's judicial admission that the employment agreement expired before Miller's termination; (2) enforcing the contingent note payable clause because it was either a penalty clause and, thus, void as against public policy, or an unreasonably restrictive covenant; and (3) using its police powers to enforce a contractual agreement penalizing Miller because he is a homosexual. I agree with the conclusion of my colleagues that Miller's first two arguments are without merit for the reasons given in Judge Popovich's Opinion. However, as to the resolution of Miller's third argument, I must respectfully dissent. In my judgment, court enforcement of the contingent note payable clause, which was triggered by the operation of a facially discriminatory termination provision, would violate the Equal Protection Clause of the United States Constitution.

The facts of the case are as follows. In 1985, DeMuth employed Miller at his professional management consulting firm in Camp Hill, Pennsylvania. From 1986 through 1989, the parties entered into written, yearly employment contracts, each containing the following provision:

> 8. *Contingent Note Payable*. If within five years of the termination of this Agreement if the Employee terminates the Agreement or the Employer terminates the

> Agreement for cause, and the Employee establishes a professional management consulting or accounting firm within a 50-mile radius of any of Employer's current or former clients, he agrees to pay the Employer 125% of the previous 12 months' charges for each of the Employer's clients who retain his professional management consulting or accounting services. Cause shall include, but is not limited to, ... homosexuality.

Complaint, Plaintiff's Exhibit A, at 12; R.R. at 272a. See also N.T., June 21, 1993, at 16-18.

In late September, 1990, Miller was interviewed by a television reporter in Harrisburg where he and others had gathered to voice concern over an alleged incident of anti-homosexual violence. As a result, DeMuth learned that Miller had declared that he was a homosexual. In October, 1990, he terminated Miller's employment because of Miller's professed homosexuality. N.T., supra, at 33-34, 36, 58, 60-61, 63, 66-67. Subsequently, DeMuth wrote to Miller's former clients, informing them that Miller was terminated because he was a homosexual. He also suggested that they consider obtaining an HIV test if they were contemplating continued interaction with Miller.

Thereafter, Miller opened a practice and successfully solicited business from some of DeMuth's former clients. DeMuth filed suit, seeking enforcement of the contingent note payable clause providing for liquidated damages for Miller's alleged breach of the noncompetition clause. Following trial, the jury rendered a verdict for DeMuth, upon which judgment was entered. Miller filed post-trial motions seeking, among other things, entry of judgment

notwithstanding the verdict. His post-trial motions, in relevant part, were denied, and this appeal followed.

Miller contends that the court's enforcement of the disputed contractual provision constituted state action for constitutional purposes, whereby his right to equal protection of the laws, guaranteed under the Fourteenth Amendment of the United States Constitution, was violated. For the reasons set forth below, I agree.

The Fourteenth Amendment, in pertinent part, provides:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Because "[t]hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful," *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948), it must first be determined whether there was state action in the present case.

It is well-settled that judicial enforcement of private contracts, where such enforcement furthers private discrimination, constitutes state action and may result in a denial of equal protection. *Shelley*, supra; *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); *Fleming v. Mack Trucks, Inc.*, 505 F.Supp. 169, 171 n. 4 (E.D.Pa.1981). This form of state action is found, not in cases "in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit[,] but "[r]ather, [in] cases in which the States have made available to such individuals the full coercive power of government to deny" another

equal protection of the laws. *Shelley*, supra, at 31, 68 S.Ct. at 845, 92 L.Ed. at 1183.

In *Shelley*, property owners asked the Court to enforce a racially restrictive covenant. The Court found that, while private, consensual adherence to discriminatory covenants would not implicate the Fourteenth Amendment, state action within the meaning of the Fourteenth Amendment is present where the purposes of those agreements can be secured only by state court enforcement. The *Shelley* Court then held that the state, through court enforcement of the discriminatory covenant, had denied the petitioners equal protection of the laws.

Since that decision, courts have found *Shelley*'s interpretation of state action applicable in cases not involving racial classifications. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (enforcement of union-shop agreement); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960) (determining right to occupancy of religious cathedral); *Casa Marie, Inc. v. Superior Ct. of Puerto Rico*, 988 F.2d 252 (1st Cir.1993) (challenge by elderly and disabled to zoning ordinances and restrictive covenant); *United States v. Wilson*, 922 F.2d 1336 (7th Cir.) (enforcement of plea bargain coerced by third party), *cert. denied*, 502 U.S. 850, 112 S.Ct. 155, 116 L.Ed.2d 120 (1991); *Ahmad v. Wigen*, 726 F.Supp. 389 (E.D.N.Y.1989) (enforcement of extradition orders to countries where repression may occur), aff'd, 910 F.2d 1063 (2d Cir.1990); *Cosfol v. Varvoutis*, 419 Pa. 28, 213 A.2d 331 (1965) (court interference in religious affairs of church).

In the present case, we are asked to enforce the liquidated damages provision of a covenant not to compete where the triggering of the covenant depended directly on the operation of a facially discriminatory termination clause. According to P 8 of the Employment Agreement, the covenant was to take effect only if Miller were terminated "for cause, ... includ[ing] ... homosexuality." The operation of the damages provision, set forth in the same paragraph, cannot, on the facts of this case, realistically be separated from DeMuth's discriminatory termination of Miller. Cf. *Woodward v. United States*, 871 F.2d 1068, 1073 (Fed.Cir.1989) (argument that discharge of a Naval reserve would have occurred absent his homosexuality "fail[ed] to take into account that [his] file would not have reached the reviewing office at all had he not been homosexual and admitted [to it]"), *cert. denied*, 494 U.S. 1003, 110 S.Ct. 1295, 108 L.Ed.2d 473 (1990).

Because DeMuth seeks court enforcement of this provision, this is not a case in which the court's "mere acquiescence" in a private action is sought. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 164, 98 S.Ct. 1729, 1737, 56 L.Ed.2d 185, 198 (1978). Nor is this a case in which an injured party has asked the court to obstruct private discrimination. Rather, we are presented with the unusual circumstance in which the party wishing to discriminate seeks the court's aid in furthering and, indeed, profiting from his discriminatory plan. This case, like *Shelley*, is one in which the private "injury caused is aggravated in a unique way by the incidents of governmental authority...." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660, 674 (1991) (interpreting *Shelley*).

In addition, it is of no moment that Miller entered into a contract containing the disputed provision. Such was also the case in *Barrows*, supra. In *Barrows*, property owners sought to enforce a racially restrictive covenant against another property owner who had initially agreed to adhere to the covenant, but who later wished to sell the property despite it. The Court found that

> voluntary adherence [to a covenant] would constitute individual action only. When, however, the parties cease to rely upon voluntary action to carry out the covenant and the State is asked to [enforce] the covenant, the first question that arises is whether a court's awarding damages constitutes state action under the Fourteenth Amendment.

Barrows, supra, at 253-54, 73 S.Ct. at 1033, 97 L.Ed. at 1594. The *Barrows* Court concluded that the state court's enforcement of the covenant did constitute state action because, with court enforcement, "it becomes not [the owner's] voluntary choice but the State's choice that she observe her covenant or suffer damages." Id. at 254, 73 S.Ct. at 1034, 97 L.Ed. at 1594. Similarly, in the present case, "but for the active intervention of the state courts," Miller would be free to operate his business without paying damages. See *Shelley*, supra, at 30, 68 S.Ct. at 845, 92 L.Ed. at 1183.

Accordingly, pursuant to *Shelley* and *Barrows*, judicial enforcement of the damages provision against Miller, where the provision's operation resulted directly from DeMuth's discriminatory act, constitutes state action for constitutional purposes. Therefore, Miller's claim that his rights under the Equal Protection Clause have been violated must be addressed.

In analyzing this claim, it is necessary, initially, to determine the appropriate level of scrutiny to be applied to the challenged classification. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Generally, a challenged classification is presumed to be valid and need only be rationally related to a legitimate end. Id. However, that presumption gives way when a classification is considered suspect or quasi-suspect because it is based on factors, such as race or sex, that are seldom relevant to the achievement of any legitimate state interest. Id. Miller argues that homosexuals form a quasi-suspect class and, therefore, that the challenged classification must be subjected to heightened scrutiny. If so, the classification must be substantially related to an important governmental interest. Id.

The United States Supreme Court has never determined whether a classification based on sexual orientation is quasi-suspect. Recently, however, a federal district court, faced with such a claim, determined that classifications based on sexual orientation are, indeed, quasi-suspect. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417 (S.D.Ohio 1994) (enjoining voter-initiated amendment to city charter that would bar city from prohibiting discrimination based on sexual orientation); see also *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari) (employment classification based on homosexuality deserving of at least heightened scrutiny); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed. 1988) ("homosexuals in particular seem to satisfy all of the Court's implicit criteria of suspectness"). Nevertheless, while Miller's argument is not without force, I find it unnecessary to decide whether a classification based on

sexual orientation is quasi-suspect because, for the reasons set forth below, I conclude that the challenged classification fails to satisfy even the less stringent, rational-basis standard.

Generally, a non-suspect classification will not "run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, --- U.S. ----, ----, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257, 270 (1993). However, while the classification is presumptively valid, id., "even the standard of rationality ... must find some footing in the realities of the subject addressed...." Id. at ----, 113 S.Ct. at 2643, 125 L.Ed.2d at 271. It is well-established that "irrational prejudice," "mere negative attitudes, or [unsubstantiated] fear ... are not permissible bases for [differential] treatment." *Cleburne*, supra, at 448-50, 105 S.Ct. at 3259-60, 87 L.Ed.2d at 325-27 (finding classification based on mental retardation irrational); see also *Able v. United States*, 863 F.Supp. 112 (E.D.N.Y.1994) (military policy of discharging homosexuals, if based on prejudice, is irrational). Therefore, if the classification based on sexual orientation in the present case is founded on prejudice or unsubstantiated fear, it cannot be enforced without violating the Equal Protection Clause of the Fourteenth Amendment. See also *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782, 788 (1973) (finding discrimination aimed at hippies irrational and concluding that, if "the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Recently, the Ninth Circuit Court of Appeals, in *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir.1994), considered a similar claim when faced with an equal protection challenge by Keith Meinhold to his Naval discharge because of his status as a homosexual. Meinhold, who had served successfully as an enlisted member of the United States Navy for 12 years, was discharged, like Miller, after a television acknowledgment that he was gay. Meinhold was not accused of engaging in any homosexual conduct that interfered with his service. Although recognizing that military decisions are entitled to great deference, the court nevertheless concluded that the policy of discharge, to the extent that it rested solely on the status of homosexuality, was without rational basis. Accordingly, it affirmed summary judgment for Meinhold. See also *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319, 1337 (E.D.Cal.1993) (construing *Cleburne* and *Heller* to find Navy's discharge of Dahl for homosexual status was based on illegitimate prejudice and was, therefore, irrational as a matter of law); *Cammermeyer v. Aspin*, 850 F.Supp. 910, 929 (W.D.Wash.1994) (Army nurse discharged for homosexual status entitled to judgment as a matter of law on equal protection claim because a policy, whether "founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification").

The present case does not implicate a similar policy of special deference. Here, DeMuth conceded at trial that he terminated Miller's employment because of his homosexuality. N.T., supra, at 33-34, 36, 58, 60-61, 63, 66-67. As in *Meinhold*, *Dahl* and *Cammermeyer*, there were no allegations that Miller engaged in homosexual conduct in the course of his employment. Miller's discharge, like those described above, was based on

Miller's acknowledged status as a homosexual. This reveals precisely the kind of action based on prejudice that was rejected as irrational in the above-cited cases. See also *Cleburne*, supra 473 U.S. 432, 105 S.Ct. 3249; *Moreno*, supra 413 U.S. 528, 93 S.Ct. 2821.

Moreover, in *Equality Foundation of Greater Cincinnati, Inc.*, supra, 860 F.Supp. 417, a federal district court in Ohio enjoined a voter-initiated amendment to the Cincinnati Charter, which would have barred the city from enacting legislation protecting homosexuals from discrimination based on sexual orientation. The court, considering an equal protection challenge, found that

> sexual orientation, whether hetero- homo-, or bisexual, bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society. Indeed the American Psychological Association has so concluded: ....If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of "staying in the Closet" and of "coming out" would not exist; their impediment would betray their status.

Id. at 437 (citation omitted). Although that court concluded that homosexuals constitute a quasi-suspect class, it nevertheless found that the challenged classification could not survive rational-basis scrutiny.

In the present case, DeMuth acknowledged that Miller was capably performing his job prior to discharge. N.T., supra, at 46-49, 64. In fact, DeMuth admitted that Miller was on the partnership track. Id. at 57. Miller's

homosexuality did not affect his ability to work for DeMuth, and the decision to terminate him is not justified by nondiscriminatory reasons that are unrelated to Miller's homosexuality. Thus, court enforcement of DeMuth's actions, "far from demonstrating governmental neutrality on the issue of homosexuality, [would give] effect to private prejudice." *Equality Foundation*, 860 F.Supp. at 444, citing *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). See also *Dahl*, supra 830 F.Supp. 1319 (concluding that both plaintiff's and defendant's evidence showed discharge decision not based on inability to perform work and finding military policy irrational).

DeMuth also claimed that he feared others' prejudice toward Miller and that this concern provided a legitimate basis for his actions. N.T., supra, at 60. However, fear of prejudice cannot justify court advancement of DeMuth's actions. A similar justification for court involvement was rejected in *Palmore*, supra. There, the Court overturned the denial of child custody to a natural mother based on the mother's biracial remarriage. The Court rejected the argument that the award of custody was improper in light of the societal pressures the child would face. Relying upon *Shelley*, supra 334 U.S. 1, 68 S.Ct. 836, the Court first concluded that judicial action in awarding custody was a form of state action. It then determined that society's negative reaction to the child's being raised within a biracial marriage did not legitimate the custody denial. The Court concluded that, while "[t]he Constitution cannot control such prejudices[,] ... neither can it tolerate them." *Palmore*, supra, at 433, 104 S.Ct. at 1882, 80 L.Ed.2d at 426. See also *Dahl*, supra (interpreting *Palmore* and rejecting argument that heterosexual dislike and fear of homosexuals was a rational basis for the military's exclusionary policy); *Blew v. Verta*, 420 Pa.Super. 528, 617

A.2d 31 (1992) (concern over negative societal reactions could not justify a court's custody restrictions placed on lesbian parent).

Similarly, while DeMuth's "[p]rivate biases may be outside the reach of the law, ... the law cannot, directly or indirectly, give them effect." *Palmore*, supra, at 433, 104 S.Ct. at 1882, 80 L.Ed.2d at 426; *accord Cleburne*, supra, at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326; *Equality Foundation*, supra, at 441. Notably, the impetus for this case was Miller's success in acquiring the business of DeMuth's former clients. Thus, not only does DeMuth's concern about client prejudice fail to justify his actions, but also reality has borne out the false nature of his concerns.

In responding to Miller's equal protection claim, DeMuth relies on several cases in which differential treatment of homosexuals was found to be rational. See Brief for Appellee at 25-35, citing, among other cases, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990) (Department of Defense denial of security clearances); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989) (Army discharge), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); *Woodward*, supra (Naval discharge); *Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987) (FBI discharge). However, those cases do not militate in favor of a finding that the challenged action in the present case was rationally related to a legitimate end. In the first place, each case relied on the policy of judicial deference afforded governmental decisions implicating national security concerns, none of which are present here. *High Tech Gays*, 895 F.2d at 577; *Ben-Shalom*, 881 F.2d at 463-65; *Woodward*, 871 F.2d at 1077; *Padula*, 822 F.2d at 104. Moreover, the courts in *Ben-Shalom*, 881 F.2d at 464, *Woodward*, 871 F.2d at 1074 n.

6, and *Padula*, 822 F.2d at 102, determined that the issue presented involved prohibited homosexual conduct rather than status-based discrimination. Similarly, in *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.1991), *cert. denied*, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992), the Ninth Circuit Court of Appeals reviewed its decision in *High Tech Gays* and determined that it, too, "was a case relating to conduct, not orientation." Id. at 1166 n. 5. The court proceeded to find that Pruitt, a chaplain discharged from the Army Reserve after acknowledging her homosexuality in an interview with the Los Angeles Times, had stated an equal protection claim.

Moreover, contrary to DeMuth's assertions, see Brief of Appellee at 25-35, the decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), does not require a different result. In *Hardwick*, the Court upheld the constitutionality of a Georgia sodomy statute against Hardwick's claim that it violated his fundamental right to privacy. However, the Court specifically noted that Hardwick did "not defend the judgment below based on ... the Equal Protection Clause." Id. at 196 n. 8, 106 S.Ct. at 2847 n. 8, 92 L.Ed.2d at 149 n. 8. Therefore, it is inapposite. See *Schowengerdt v. United States*, 944 F.2d 483, 490 n. 8 (9th Cir.1991) (distinguishing equal protection from substantive due process challenge to military policy), *cert. denied*, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992); *Evans v. Romer*, 882 P.2d 1335, 1349-50, *40-41 (Oct. 11, 1994) (holding state initiative barring protection against discrimination aimed at homosexuals unconstitutional and concluding that *Hardwick* decision on right to privacy does not abate other rights of homosexuals); Prof. Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55

U.Chi.L.Rev. 1161 (1988). Further, nothing in *Hardwick*, which held that a state could constitutionally criminalize homosexual sodomy, suggests that a state may discriminate against or penalize an individual because of the status of sexual orientation alone. Cf. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (state may not criminalize status of drug addiction absent prohibited acts); see also *Meinhold*, supra, 34 F.3d at 1476-79 (distinguishing homosexual conduct from status of sexual orientation); *Equality Foundation*, supra, 860 F.Supp. at 424, 426, 437-40 (same, and distinguishing *Hardwick*); *Cammermeyer*, supra, 850 F.Supp. at 918-20 (same).

In sum, because DeMuth's termination of Miller was admittedly based on prejudice, I find that, pursuant to the reasoning of *Cleburne*, *Equality Foundation*, *Meinhold* and the other cases discussed above, DeMuth's action was without a rational basis. Accordingly, the trial court, through its powers as an agent of the state, could not enforce the related liquidated damages provision without advancing an impermissible, discriminatory end and thereby offending the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

At this point, I note my disagreement with Judge Popovich's characterization of the third issue in this case. My colleague maintains that the termination of Miller was not related only to Miller's homosexuality, but also to his public communication of his views on television. See Opinion by Popovich, J., at 18-21. He then analyzes Miller's claim based upon that characterization and resolves the issue against Miller. Id. However, DeMuth conceded at trial that the termination related directly to Miller's homosexuality. N.T., supra, at 33-34, 36, 58, 60-61, 63, 66-67. Thus, the issue that Judge Popovich addresses,

which is more properly framed as whether the court could enforce the disputed contract provision for a termination related to public, political speech regarding anti-homosexual violence, is not before us. But compare *Van Ooteghen v. Gray*, 654 F.2d 304 (5th Cir.1981) (dismissal of assistant county treasurer because of his announced intention to publicly address civil rights of homosexuals violated First Amendment), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1255, 71 L.Ed.2d 447 (1982); *Ancafora v. Board of Educ.*, 491 F.2d 498 (4th Cir.) (school teacher's addressing homosexuality during TV appearance could not justify dismissal because speech was constitutionally protected), *cert. denied*, 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d 63 (1974). Moreover, as discussed above, DeMuth's concern over others' reactions to the television appearance cannot legitimate Miller's termination. See *Palmore*, supra 466 U.S. 429, 104 S.Ct. 1879.

Lastly, I find that the trial court erred in rejecting Miller's equal protection claim based, in part, on its inability to discern "any current legislative or societal consensus" that disdain for homosexuals is a type of bigotry. Trial Court Opinion, dated December 20, 1993, at 6. The trial court offers no authority that requires such a determination as a prerequisite to an equal protection analysis. Indeed, this type of an inquiry would be antithetical to the very purpose of the constitutional guarantee of equal protection of the laws to all individuals. Hence, the trial court erred in preceding its constitutional analysis with a determination of public policy. Further, the trial court's analysis overlooks significant sources of legislative and societal consensus. Such "sources of public policy [which may limit an employer's right of discharge] include legislation [and] administrative rules, regulation, or decision...." *Cisco v. United Parcel Servs., Inc.*, 328

Pa.Super. 300, 306, 476 A.2d 1340, 1343 (1984), quoting *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (N.J.1980). Pursuant to executive order, Pennsylvania bans employment discrimination based on sexual orientation in any agency under the jurisdiction of the governor. Pa.Exec.Order No. 1988-1 (1/20/88), reprinted in 4 Pa.Code § 1.4 (1988). In addition, many cities across the state have outlawed employment discrimination based on sexual orientation. See Pittsburgh, Pa., Code, title VI, art. 5, ch. 651 et seq. (1990); Philadelphia, Pa., Code, ch. 9-1100, § 9- 1103 (1982); Harrisburg, Pa., Codified Ordinances, art. 725, § 725.06 (1983); Lancaster, Pa., Ordinance 11 (1991); York, Pa., Codified Ordinances, art. 185, § 185.02 (1992). Moreover, even if it were true that state law would not prevent DeMuth's private discrimination based on sexual orientation, the United States Supreme Court, in *Shelley*, made clear that, when courts enforce private action, such "judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." *Shelley*, supra, at 31, 68 S.Ct. at 845, 92 L.Ed. at 1184.

Based on the foregoing analysis, I would find that the trial court erred in denying Miller's motion for judgment notwithstanding the verdict and in entering judgment in favor of DeMuth. Therefore, I would reverse the entry of judgment and direct entry of judgment notwithstanding the verdict in favor of Miller.

DONALD L. DEMUTH,	:	IN THE COURT OF
	:	COMMON PLEAS OF
Plaintiff	:	CUMBERLAND
	:	COUNTY,
vs.	:	PENNSYLVANIA
	:	
DANIEL C. MILLER,	:	CIVIL ACTION - LAW
	:	
Defendant	:	NO. 4072 CIVIL 1991

IN RE: POST-TRIAL MOTIONS OF DEFENDANT

BEFORE HOFFER, J AND HESS, J.

ORDER

AND NOW, this 20th day of December, 1993, the post-trial motions of the parties are GRANTED, in part, and the verdict herein is molded in favor of the plaintiff and against the defendant in the amount of $110,000.00, together with interest from and after November 30, 1990. The remaining post-trial motions are DENIED.

BY THE COURT,

/S
Kevin A. Hess, J.

Samuel L. Andes, Esquire
For the Plaintiff

Markian R. Slobodian, Esquire
Beatrice Dohrn, Esquire
For the Defendant
:rlm

DONALD L. DEMUTH,	:	IN THE COURT OF
	:	COMMON PLEAS OF
Plaintiff	:	CUMBERLAND
	:	COUNTY,
vs.	:	PENNSYLVANIA
	:	
DANIEL C. MILLER,	:	CIVIL ACTION - LAW
	:	
Defendant	:	NO. 4072 CIVIL 1991

IN RE: POST-TRIAL MOTIONS OF DEFENDANT

BEFORE HOFFER, J AND HESS J.

OPINION AND ORDER

In October of 1990, the plaintiff, Donald L. DeMuth, fired the defendant, Daniel C. Miller, when he learned that Miller had appeared on a local television station as a spokesman for a gay rights group. Miller, a certified public accountant, had worked for DeMuth since December of 1985 as a professional management consultant in DeMuth's firm, a business which nearly exclusively serves health care professionals. Following a probationary period, Miller became a contract employee. Over the years, his salary was raised substantially. At least three different one year employment contracts were entered into between the parties, covering the period May 1986 through May 1989. At the trial of the case, the plaintiff produced an unsigned copy of a contract which purported to run from June 1, 1989, to May 31, 1990, and testified that although he could not locate his signed copy of the agreement, he believed that one had been executed. The plaintiff conceded, however, that no contract was in effect in October 1990 when Miller was dismissed.

Pursuant to the terms of the earlier written contracts, Miller could be terminated "for cause." The contract went on to define "cause" as including, among other things, homosexuality. The document further required that, in the event of such termination, Miller would be required to pay DeMuth a sum equal to 125 percent of the fees received by DeMuth from clients taken by Miller, following termination, based on the total fees received from those same clients during the twelve months prior to the termination.

In November of 1991, the plaintiff filed his complaint seeking money damages with respect to those clients of his who had left him in favor of Mr. Miller. The defendant filed a counterclaim in defamation based on a letter which Mr. DeMuth had written prospective clients of Miller suggesting that contact with Miller might involve an increased risk of contracting HIV infection.

At the trial of the case, we permitted to go to the jury the question of whether or not the previous written terms of the parties' contract remained in full force and effect by virtue of their intervening conduct. We also denied motions to dismiss based on an assertion that the homosexuality provisions of the contract were unenforceable as against public policy. In its verdict, the jury specifically found that Mr. Miller had not misappropriated confidential or secret information belonging to DeMuth insofar as his client base was concerned. On the other hand, they expressly concluded that the parties were bound by their earlier contract containing a provision making homosexuality a basis for terminating Miller's employment. They then went on to award damages in the amount of $123,648.43; this notwithstanding the stipulation of the parties that 125 percent of all billings which could arguably

fall within the disputed contract clause would not exceed $110,000.00.

The basis for relief, asserted by the defendant in his post-trial motions, are several. We will deal with these matters in the order in which they were briefed by the parties.

The defendant first suggests that the judgment must be entered, notwithstanding the verdict, for the reason that the contract whereby the plaintiff was permitted to fire the defendant for being gay violated either public policy or state and federal constitutions. The defendant cites to executive orders of this Commonwealth and to other holdings of our courts which prohibit actions of the government -- the exercise of state action -- in indulging in discrimination of the type at bar. The defendant then argues that merely because enforcement of the contract has been sought in a court of law, the discrimination is one being perpetrated by the government rather than by a private individual. Indeed, in *Shelly v. Kraemer,* 334 U.S. 1 (1948), the Supreme Court of the United States held that the judicial enforcement, by state courts, of covenants restricting the use or occupancy of real property of persons of the white race violated the equal protection clause of the Fourteenth Amendment. The Court, while conceding that the Fourteenth Amendment did not reach private conduct but was directed against state action only, held, nonetheless, that judicial action in the enforcement of private agreements is state action and that enforcement of restrictive covenants against certain races was violative of the Fourteenth Amendment. *Shelly*, in essence, vindicated the views of Mr. Justice Harlin who in dissenting in *Plessy v. Ferguson*, 163 U.S. 537 at 559 (1896) penned the immortal words: "Our constitution is color blind." At the heart of this case

is the question of whether or not the constitution is equally blind to sexual orientation.

In this regard, we are without appellate guidance in Pennsylvania. Certain federal courts have spoken to the issue, some more recently than others. In 1975, in *Binnie E. Smith v. Liberty Mutual Insurance Co.*, 395 F.Supp. 1098 (1975), the United States District Court dealt with the question of whether or not the Civil Rights Act of 1964 forbade employment discrimination based on "affectional or sexual preference." Without addressing the issue from a constitutional standpoint, the court assumed that the matter of forbidding discrimination based upon "affectional or sexual preference" was a matter for the legislature. The court left no doubt concerning its feelings in a footnote:

> Significantly, it appears that H.R. 5452 is presently pending before the Congress; it would, if enacted, forbid such discrimination; it has not been enacted as law by the Congress. It will not be enacted here in these chambers.

Smith, at 1101, note 6.

More recently, the federal courts have dealt head-on with the constitutional issues having to do with sexual orientation and employment. These make clear that, while Fifth Amendment equal protection claims are brought with respect to acts of the federal government and Fourteenth Amendment equal protection claims relate to actions of the states, the standards for both are essentially the same.

In *Doe v. Gates*, 981 F.2d 1316 (1993), the United States Court of Appeals for the District of Columbia circuit assumed that a blanket policy on the part of the CIA,

against the employment of homosexuals, would violate equal protection rights under the Fifth Amendment but did so only for the purpose of argument. The court based its decision on the fact that the plaintiff was unable to point to evidence contradicting the government's position that the CIA discharged him after an individualized assessment of the circumstances of his case, rather than pursuant to a blanket ban. In other words, the record of the case did not support a contention that Doe was dismissed merely because of the fact that he was homosexual.

In *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319 (1993), the United States District Court for the Eastern District of California dealt with the policy of the United States Navy excluding homosexuals. The case involves a lengthy discussion of the test to be applied in analyzing equal protection claims. The court determined that the so-called "strict scrutiny" test was inapplicable and went on to apply what they called an "active rational basis review." Citing recent pronouncements of the Supreme Court, the District Court suggested that the burden is no longer on a policy maker to persuade a court that a policy possesses a rational basis. The burden, rather, is on a person challenging a policy to negate a rational basis for legislative justification. They also agreed that judicial review of military regulations is more deferential than a constitutional review of similar laws or regulations designed for civilian society. All of this notwithstanding, the court, after reviewing various reports which had been made part of the record in the case, went on to conclude that virtually all of the reasons asserted by the Navy as a basis for their policy were prejudicial on their face; in other words, the bases for the policies were not grounded in facts. However, we note that the court based its conclusion on a substantial factual record including testimony of none other than General Norman Swartzkoff.

We could continue our analysis of various cases dealing with similar equal protection claims. *See*, e.g., *Stephan v. Aspin*, ___ F.3d ___, 1993 W.L. 465530 (D.C. Cir.), *Jantz v. Muci*, 976 F.2d 623 (1992). We are satisfied, however, that this would be to no end. These cases each deal carefully with the state of a factual record adduced in the context of a federal claim. In this case, there was no factual record made with respect to the due process or public policy claim, apart from the contractual aspect of the lawsuit.

The defendant, of course, suggests that the discrimination, inherent in Mr. Demuth's actions, is so obvious that the fact that it is violative of due process requires no proof. It would, however, be the height of impercipience for us to fail to take note of the national dialogue currently being conducted with respect to employment discrimination and gays. There is broad disagreement on the question of whether or not one's freedom of association encompasses a right of hiring and firing based on sexual orientation or whether a disdain for a lifestyle equates to bigotry. Despite the protestations of the defendant to the contrary, we fail to discern any current legislative or societal consensus on these matters. In the meantime, we are not justified in defining public policy based on what we think it ought to be. In these regards, we take our cue from Judge Learned Hand who wrote:

> Nor ~~is it~~ desirable for a lower court to embrace the ... opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.

Spector Motor Service v. Walsh, 139 F.2d 809, 823 (1944).

As another basis for post-trial relief, the defendant contends that we erred in permitting the jury to infer that

the relevant terms of an employment contract remained in effect between the parties even though the written contract had, itself, expired. We did, indeed, leave this question in the hands of the jury. We continue to believe that, in doing so, we acted properly. The factual inconsistencies in the case were, obviously, for the jury to resolve. In applying the facts, we instructed them that in accordance with *Smith v. Shallcross et al.*, 165 Pa.Super. 472, 475, 69 A.2d 156, 158 (1949) as cited in *Burge v. Western Pennsylvania Higher Education Counsel, Inc.*, 391 Pa.Super. 108, 112, 570 A.2d 536 at 538 (1990), to the effect that:

> Where a contract of employment for a definite time is made and the employee's services are continued after the expiration of the time, without objection, the inference is that the parties have assented to another contract for a term of the same length with the same salary and conditions of service.

We are satisfied that this continues to be the law in the Commonwealth.

Third, the defendant contends that the "contingent note payable" clause of the employment agreement is either an unlawful penalty or an unreasonable restriction on Miller's right to practice his chosen profession. This argument has surfaced, for the first time, during post-trial motions. In other words, it was not raised in any of the pre-trial motions or at the trial itself. Specifically, there was no objection when we instructed the jury concerning the measure of damages in this regard. We are satisfied, therefore, that the issue has not been properly preserved for the purpose of post-trial argument.

Finally, the defendant cites as error a jury verdict in excess of $124,000.00 when the parties stipulated that damages due under the contract would not exceed $110,000.00. The plaintiff, in his brief, acknowledges that he is bound by the stipulation and we will mold the verdict accordingly.

We agree with the plaintiff that, in doing so, we must award prejudgment interest.

ORDER

AND NOW, this 20th day of December, 1993, the post-trial motions of the parties are GRANTED, in part, and the verdict herein is molded in favor of the plaintiff and against the defendant in the amount of $110,000.00, together with interest from and after November 30, 1990. The remaining post-trial motions are DENIED.

BY THE COURT,

/S
Kevin A. Hess, J.

Samuel L. Andes, Esquire
For the Plaintiff

Markian R. Slobodian, Esquire
Beatrice Dohrn, Esquire
For the Defendant

:rlm